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**IN THE
COURT OF APPEALS OF INDIANA**

JORGE LOPEZ,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 82A01-0711-CR-510

APPEAL FROM THE VANDERBURGH COURT
The Honorable Wayne S. Trockman, Judge
Cause No. 82D02-0412-FD-985

November 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jorge Lopez appeals the trial court's denial of his motion to withdraw his guilty plea. Specifically, Lopez argues that his trial counsel was ineffective because counsel failed to advise him of possible immigration problems that could arise by pleading guilty to possession of cocaine, notwithstanding the fact that this case was ultimately dismissed because Lopez successfully completed a diversion program. However, Lopez did not raise this precise issue before the trial court—either in the motion to withdraw his guilty plea or in the hearing before the trial court. Because there is no evidence on this issue in the record before us, the issue is waived for review. We therefore affirm the trial court's denial of Lopez's motion to withdraw his guilty plea.

Facts and Procedural History

In December 2004 the State charged Lopez, a Mexican national married to a United States citizen, with Class D felony possession of cocaine. In May 2005 Lopez pled guilty to possession of cocaine, and the trial court found a factual basis, withheld judgment for eighteen months, and placed Lopez in a diversion program. Lopez successfully completed the program, and the State dismissed the case against him on December 4, 2006. Appellant's App. p. 3; Tr. p. 15.

In June 2007 Lopez filed a motion to withdraw his guilty plea. In the motion, he alleged that when he pled guilty in May 2005, his "understanding and comprehension of the English language was limited." Appellant's App. p. 39. He further alleged that at that time, he "believed he was agreeing to drug Counseling," not "to the facts obtained in the charge against him." *Id.* As such, Lopez sought to withdraw his plea of guilty to

correct a “manifest injustice.” *Id.* The trial court held a brief hearing, took the motion under advisement, and denied it in August 2007. *Id.* at 3 (CCS entry). Lopez now appeals.

Discussion and Decision

Lopez contends that the trial court erred in denying the motion to withdraw his guilty plea. Indiana Code § 35-35-1-4(b)¹ governs this matter and provides:

(b) After entry of a plea of guilty . . . but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty . . . for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant’s plea. The motion to withdraw the plea of guilty. . . made under this subsection shall be in writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. *However, the court shall allow the defendant to withdraw his plea of guilty . . . whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.*

(Emphasis added). Although in the motion to withdraw his guilty plea Lopez argued that his understanding of English was limited and he thought he was agreeing to drug counseling, on appeal he switches gears and argues that his trial counsel was ineffective because counsel failed to advise him of possible immigration problems that could arise by pleading guilty to possession of cocaine, notwithstanding the fact that the case was ultimately dismissed because he successfully completed a diversion program. However, at no time was this particular issue raised before the trial court—either in Lopez’s motion to withdraw his guilty plea or at the hearing before the trial court on this matter. As such,

¹ Although Lopez filed the motion to withdraw his guilty plea late in the game, Indiana Code § 35-35-1-4(c), which governs withdrawals of guilty pleas after a “convicted” person is “sentenced,” does not apply because Lopez successfully completed a diversion program. Thus, he was neither convicted nor sentenced.

there is absolutely no evidence in the record before us that trial counsel *failed* to apprise Lopez that deportation was a possible consequence of pleading guilty to possession of cocaine or that Lopez would have rejected the plea and the opportunity to participate in a diversion program had he been aware of the immigration issues. *See Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001) (“We believe a showing of prejudice from incorrect advice as to the penal consequences is to be judged by an objective standard, i.e., there must be a showing of facts that support a reasonable probability that the hypothetical reasonable defendant would have elected to go to trial if properly advised.”). Instead, we have appellate counsel’s allegation, unaided by any factual development. As such, Lopez has waived this issue for review. We therefore affirm the trial court’s denial of Lopez’s motion to withdraw his guilty plea.

Affirmed.

KIRSCH, J., and CRONE, J., concur.